

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1003

To be argued by
RHEA KEMBLE NEUGARTEN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1003

UNITED STATES OF AMERICA,

Appellee,

—v.—

SEYMOUR C. FELDMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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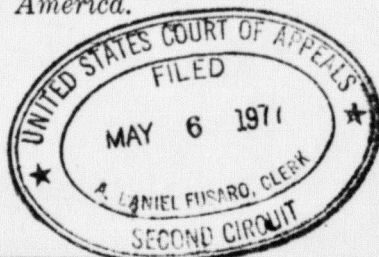


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Seymour C. Feldman appeals from a judgment of conviction entered on December 22, 1976, in the United States District Court for the Southern District of New York, after an eight day trial before the Honorable William C. Conner.

Indictment 76 Cr. 44, filed January 15, 1976, charged Seymour C. Feldman, M.D., with fraud and false statements in connection with Requests for Payment submitted by mail for ultimate reimbursement by the Federal government for services Dr. Feldman claimed to have rendered to patients covered by Medicare. Counts One through Ten charged Dr. Feldman with mail fraud in violation of Title 18, United States Code, Section 1341. Counts 11 through 60 charged Dr. Feldman with making false claims upon and against the United States, in violation of Title 18, United States Code, Section 287.

The trial commenced on October 28, 1976, and concluded on November 10, 1976, when the jury returned verdicts of guilty on Counts 1 through 15, 17, 18, 20 through 23, 25 through 43, 45 through 48, 50 through 56, 59 and 60.*

On December 22, 1976, Judge Conner sentenced Dr. Feldman to concurrent terms of two years imprisonment on each count of which he had been convicted, with the execution of the sentence of imprisonment suspended as to all but six months. Dr. Feldman was also placed on probation for a period of 18 months, during which time he is to make or cause to be made no claims for payment under the Medicare and Medicaid programs or any other medical assistance program.

Dr. Feldman has been released on his own recognizance pending this appeal.

Statement of Facts

The Government's Case

Besides being employed as a staff psychiatrist at Harlem Valley State Hospital, and holding a commission as a Lt. Colonel in the Army reserve, Dr. Feldman also conducted a private practice in general medicine. A substantial portion of the private practice involved treating elderly patients insured under the Medicare program. Generally, rather than receiving any money directly from the patients, Dr. Feldman was paid by submitting claims forms, known as Requests for Payment or Form 1490's (hereinafter 1490's), to the federal government.

* On November 9, 1976, the Government's motion to dismiss Counts 16, 19, 24, 44, 49, 57 and 58 had been granted. The guilty verdict was returned on all remaining counts.

The indictment as it was eventually submitted to the jury referred to forty-four separate claims forms for the period 1971 through 1975. Each such 1490 requested payment for treatments made on more than one day.

The proof at trial demonstrated that as to each 1490, all or some of the treatments were not and in fact could not have been performed as billed, for at least one of three different reasons: (1) Dr. Feldman was out of town at Army annual training and could not have performed any treatments at the patient's home or in his office (the "military counts"); (2) the patient was in the hospital on the days in question and Dr. Feldman was not a treating physician (the "hospital counts"); or (3) the 1490 requested payment for more frequent treatments than Dr. Feldman ever performed for that particular patient (the "runaway billing" counts). The specific proof of those frauds was as follows.*

A. Dr. Feldman and the Medicare System

Dr. Feldman graduated from the New York University School of Medicine in 1950. (Tr. 355).** He thereafter held various internships, residencies, and posts. From February 1, 1968, through July 23, 1974, Dr. Feldman was a high ranking (Tr. 35) psychiatrist on the staff of Harlem Valley State Hospital (Tr. 35, 43), and thereafter was employed by the Matteawan State Hospital for the Criminally Insane. (Tr. 356). During the period 1971

* Feldman's Brief merely summarizes the facts adduced during a two-week trial. Brief at 3-6. Particularly since he simultaneously challenges the sufficiency of the evidence, those facts are set out at some length here.

** Tr. refers to trial transcript; A. refers to Defendant's Appendix; GA refers to Government's Appendix; GX refers to Government Exhibit; and Br. refers to Defendant's Brief on Appeal.

through 1975, Dr. Feldman was also a Lt. Colonel in the Army Reserve. (See Tr. 46; GX 223).

In addition to his regular job, Dr. Feldman conducted a private practice from his home office in psychiatry and general medicine. (Tr. 356-57). Substantial portions of his income from private practice (Tr. 450-53) came from the treatment of Medicare patients. (See Tr. 426-39). Insofar as Dr. Feldman treated those patients, he did so largely in their homes. (Tr. 358).

As the doctor, Dr. Feldman could choose to be paid directly by the government on a so-called assigned basis (Tr. 137), or he could seek reimbursement from the patients, who would then be reimbursed by the government. Until Dr. Feldman was disqualified in 1973 from accepting "assignments" (Tr. 426-28) he was largely paid by that method. (Tr. 426). Since the federal government had contracted with insurance companies to process Medicare requests for payment (Tr. 31-32), Dr. Feldman mailed the 1490 to Blue Cross-Blue Shield, or its predecessor corporations. (Tr. 130-131, 136-138, 360). Blue Cross-Blue Shield then mailed the reimbursement checks directly to Dr. Feldman. (Tr. 136).

In those instances where Dr. Feldman did not accept assignment, Dr. Feldman still mailed in the 1490 (see Tr. 360, 369), but the checks were then mailed to the patients. (Tr. 369). Because Dr. Feldman did not customarily ask for any payment from the patient other than the reimbursement check, it was his practice to have the patient endorse the check over to him after it was received. (Tr. 369).

The claims listed in the indictment were all submitted on identical forms (See GX 18 [pertaining to counts 6 and 44]; GA 6-7), which Feldman personally completed

by hand. (Tr. 227-231, GX 273). At the bottom of each 1490, where the physician is to sign in space 14, appears the legend: "A physician's signature certifies that physician's services were personally rendered by him or under his personal direction." (See GX 18, GA 6). In the part to be filled out by the physician, the form also provides for the listing of the date of each service, the place (such as patient's home or doctor's office) where the service was performed, a description of the services, the nature of the illness or injury, and the charge. (GX 18, GA 6, items 7A-E). The physician is also to indicate whether he accepts assignment. On the reverse side of the reimbursement check is the legend: "This payment is made with federal funds. Fraud in procuring, forging of signature or endorsement, or materially altering this check is punishable under the U.S. Criminal Code." (See GX 18 B, reverse side; GA 10).*

The top part of the 1490 form is to be filled out by the patient, and calls for the patient's signature. (GX 18, GA 6). If the patient cannot sign, the person signing for the patient is to so indicate and state why the patient is not signing (GX 18, GA 7, reverse side).

In most cases, the 1490 billed for services on more than one date (See, e.g., GX 18, GA 6). Moreover, as to most patients referred to in the indictment, Dr. Feldman had submitted many more claims than simply those charged against him. (See e.g., as to Margarita Ocasio, GX 72, 167, 169, 171, 170, 166, 168, 173, 174, 175, 176, 177, 178, 179, 180, 181, in addition to GX 165 corresponding to count 60 of the indictment; Tr. 148-150, 157).

* The physician's signature on the claim form is dated, and that date—the date of the *form*, not of the service or treatment—corresponds to the date listed in the indictment.

B. The Military Counts

Each claim form enumerated in counts 11-15, 17-18, 20-23 and 25-33, reflected a charge for at least one office or patient home treatment that Dr. Feldman could not have rendered because he was away from home at military annual training. Certain of the evidence as to those counts is reflected in a chart (GX 274) that was displayed to the jury. (Reproduced at A 12a). Dr. Feldman's presence generally was required at the encampment at least by Saturday if not Friday of the initial weekend. (Tr. 54, 58). During the two weeks, Dr. Feldman had to be present every day except on the middle weekend. (Tr. 50). Although Dr. Feldman could be absent from his duties from 5:00 p.m. to 6:00 a.m. the next morning (Tr. 71), the areas were too far away for him to have commuted back to the Beacon-Poughkeepsie area where he and his patients lived.* (Tr. 356-57).

Counts 11 through 15 relate to 1490 forms (GX 110-114) in which Dr. Feldman billed for purported home visits to patients on weekdays during the time in 1975 when he was at Fort Dix, New Jersey—approximately a six hour round trip from the Beacon area. (Tr. 64). The fraudulent nature of these claims is highlighted by the fact that in the opinion of the government's handwriting expert, on the bill for services to Lillian Jacklyn (count 14, GX 113) the patient's name was forged by Dr. Feldman. (Tr. 205). Had Dr. Feldman made the visits as he billed the government for them, it would have meant that on the first Monday at Fort Dix he made three home visits, that he went back to the Beacon area again on Tuesday and also Wednesday, and that he returned to Beacon again the following Monday evening. (GX 110-

* One patient, Betty Friedman, lived in Far Rockaway, Queens (Tr. 206-206), and Mildred and Charles Horowitz lived in Bayonne, New Jersey (GX 122, 123, and 124).

114; GX 274, A 12a). In fact, rather than go home to see his patients, all Dr. Feldman did when he was on military duty was receive telephone messages from them, through his wife, when she was not at camp with him. (Tr. 337).

Counts 1, 17, 18, and 20 through 23 refer to 1490's (GX 114-118 and 94) on each of which Dr. Feldman billed for a home treatment purportedly made during the same time in 1973 that he was at Ft. Lee, Virginia, about a fourteen to fifteen hour roundtrip drive from Poughkeepsie. (Tr. 61-62). Dr. Feldman reported in on the first Saturday (Tr. 61) and as Mrs. Feldman herself admitted, stayed in Virginia with his wife until Friday. (Tr. 337-338, 344). Yet Dr. Feldman billed for home visits in the Beacon area including one purportedly made on Sunday (the day after he arrived in Virginia), two on Monday, and three on Thursday.

In 1972, Dr. Feldman spent two weeks at Fort Drum, New York, approximately an eight hour round trip from the Beacon area. (Tr. 58). Although he arrived on Friday for that encampment (Tr. 57-58), he billed for purported visits in the Beacon-Poughkeepsie area the first Saturday and Sunday, as well as one home and two office visits on the Sunday of the middle weekend. (counts 25-28; GX 120-123).*

* While the trip back was possible on the middle weekend, other evidence rendered such a hypothesis suspect. The purported office treatments made in Beacon on the middle Sunday were rendered to Dr. Feldman's wife's aunt and uncle, Mildred and Charles Horowitz, (Tr. 389) who lived far away in Bayonne, New Jersey (GX 122, 123). A handwriting expert concluded that Charles and Mildred Horowitz's signatures were forged on the 1490's, and that there was a high degree of probability that it was Dr. Feldman himself who had signed their names. (Tr. 268-269, 273). Moreover, GX 121 through 123, the subjects of Counts 26 through 28, each billed for a visit on the *first* Sunday, as well as the middle Sunday.

Dr. Feldman's 1971 encampment was at Fort Monmouth, New Jersey (GX 54-55). Dr. Feldman took his wife on that trip, and they rented a house at the Jersey shore for the first week. (Tr. 336, 342-344). Dr. Feldman did not return to Beacon until the middle weekend. (*Id.*). Ms. Horowitz stayed with the Feldmans at the shore, and did not return to Beacon with them. (Tr. 343). Yet, on a 1490 on which he apparently had forged Ms. Horowitz' signature (GX 124, Tr. 203), Dr. Feldman billed for four *office* treatments to Ms. Horowitz during the time he was at the shore. On one 1490 he also billed (counts 2 and 29, GX 95) for treatments to Betty Friedman at her home in Far Rockaway, Queens (Tr. 208) on the first Fort Monmouth weekend, as well as on the two other weekends of the encampment. On three other 1490's (counts 30, 31 and 33, GX 125, 126, 108) Dr. Feldman also billed for at least one purported home visit to a Beacon area patient during the first week, or on a weekday during the second week, at Fort Monmouth, which was about 4 to 6 hours roundtrip away.

C. The Hospital Counts

Feldman submitted 1490's billing for purported home visits to Paul Stamps and Leon Wilcox on dates when those men were in the hospital. (counts 34-36, 3 and 4; GX 1, 106, 107). From September 25 through October 9, 1972 (GX 2, Tr. 169), Paul Stamps was in Highland Hospital, where Dr. Feldman did not have privileges, and thus could not treat patients. (Tr. 170). In fact, Dr. Feldman never *treated* Mr. Stamps while he was in the hospital, but simply visited Mr. Stamps once to get his Medicare number. (Tr. 174). Yet Dr. Feldman billed the Medicare Program for three home treatments purportedly made while Stamps was in the hospital. (GX 1, counts 3 and 43).

Likewise, from October 11, 1971, through December 8, 1971 (GX 109, Tr. 183), Leon Wilcox was in Castle Point Veterans Administration Hospital. While the hospital rule was that anyone who treated the patient was to record that service in the patient's hospital records, nothing in Wilcox's hospital records (GX 109) in any way reflected that Dr. Feldman ever treated him there. (Tr. 183). Yet Dr. Feldman submitted two 1490's (GX 106 and 107, counts 35, 36 and 4) billing for five home treatments to Wilcox during the time Wilcox was at Castle Point.

D. Runaway Billing Counts

As to the remaining counts of the indictment, the government proved that with respect to 21 separate 1490's (GX 8-18, 27-32, 57, 58, 127 and 165) concerning five different patients, Dr. Feldman billed for more frequent home visits than he ever made to those patients during the relevant time periods. Each of those patients themselves, or a friend or relative with whom they lived or had close contact, testified.

1. Jule D. Adams

Although Jule D. Adams had a different regular doctor at the time (Tr. 75), Dr. Feldman became her supplementary doctor in about September 1971. (Tr. 73). For the next six months, he visited her about once a week. (Tr. 74). While Dr. Feldman never treated Ms. Adams twelve or even seven days in a row (Tr. 75), Dr. Feldman submitted a bill for services every day from August 27, 1971, through September 2 (GX 8; counts 8 and 48), and every day from December 3 through 14, 1971. (GX 10, count 46). Nor did Dr. Feldman treat Ms. Adams every third day for a month and a half, or even for

three weeks. (Tr. 76). Yet he billed Medicare for home visits virtually every third day from May 17 through June 30, 1972 (GX 16, 17, 18; counts 5, 6, 37-39), and nearly every third day from January 21, 1972 through April 11, 1972. (GX 13-15, counts 40-42). Moreover, while at no time in 1972 did Dr. Feldman ever treat Ms. Adams every other day for two weeks (Tr. 76), he billed for home visits to her every other day from January 1 through 19, 1972. (GX 12, count 43).*

Ms. Adams denied that any of the 1490's to which the indictment referred bore her signature (Tr. 77-78), and the handwriting expert confirmed that she had not signed the form as to which he testified. (GX 9; Tr. 264-265). Other falsities in some of the claims further proved that Dr. Feldman, who stipulated he had personally filled them out (GX 273), acted knowingly rather than mistakenly. For instance, while Dr. Feldman only did a uranalysis of Ms. Adams once, he billed for urinalyses on fifteen separate occasions. (GX 15, 16, 17; counts 5, 6, 37 through 39). While in fact, he never visited her on a Saturday or Sunday, he billed for several treatments purportedly made on weekends (GX 12-18; Counts 5, 6, 37-43; See GX 388, GA 1-2 [Jule Adams' 1972 chart]. And while Ms. Adams did not have diabetes and Dr. Feldman never treated her for diabetes, the same 1490's on which Dr. Feldman charged for frequent urinalyses listed "Diabetes Mellitus" as the illness being treated. (GX 16, 17, 18).

2. John Roberts

Seven counts related to seven different 1490's submitted with respect to John Roberts. (GX 27-33; Counts 4, 50-55).

* The other two Adams' 1490's mentioned in the indictment also billed for some visits far in excess of once a week. (GX 9 and 11; Counts 45 and 47).

Although John Roberts frequently saw Dr. Feldman around Roberts' apartment building, presumably treating other patients (Tr. 187, 191-2), Dr. Feldman only treated Mr. Roberts a total of four times. (Tr. 187). John Roberts specifically denied that Dr. Feldman had ever treated him 10 times in one month, or treated him every four days for about a month. (*Id.*). Yet on the seven 1490's referred to in the indictment, Dr. Feldman billed for a total of approximately 51 home treatments of John Roberts made over an interval of about a year and a half, and separately charged for performing a urinalysis on each of those visits. (GX 22-27). Moreover, each of the 1490's charged for treatments no less frequent than approximately every fourth day for the period covered. Roberts had signed none of the 1490's (Tr. 188-89), and the handwriting expert believed that it was "very, very likely" that Dr. Feldman himself had forged Roberts' signature on the particular 1490 about which the expert testified. (Tr. 281).

3. Marion Paschier

One mail fraud count and one false claims count (counts 56 and 10) related separately to two 1490's (GX 58, 57) submitted as to Marion Paschier.

According to Ms. Paschier, during the period that Mr. and Mrs. Hubbard, who were patients of Dr. Feldman, were tenants in her house, Dr. Feldman treated her generally about once a week (Paschier Tr. 4-5),* although occasionally he treated her twice a week. (Paschier Tr. 7). Yet Dr. Feldman submitted a claim for five home treatments purportedly made in the course of 12

* Citations to Paschier Tr. refer to transcript of the October 27, 1976, pre-trial videotaped deposition of Marion Paschier, which was played for the jury at trial. (Tr. 111).

days in September 1972 (GX 58) and for six home treatments in 17 days in November 1971. (GX 57). While Ms. Paschier could not tell whether she had signed the 1490's (Paschier Tr. 5-7), the handwriting expert concluded she had not, and that Dr. Feldman himself "probably" had forged her signature. (Tr. 277-79).

4. Joseph Perrotta

In 1972 Dr. Feldman treated Joseph Perrotta only about twice a month,* (Perrotta Tr. 5)** and at no time in December 1972 did he treat Mr. Perrotta three times a week. Yet Dr. Feldman billed the Medicare program for nine purported home visits made to Mr. Perrotta in less than a month and submitted a separate charge for purportedly performing a urinalysis on each of those days. (GX 127, Count 59). While Mr. Perrotta could not tell if he had signed the 1490 (Perrotta Tr. at 7), it was the handwriting expert's opinion that Perrotta had not, and that instead Dr. Feldman had signed Perrotta's name. (Tr. 279).

5. Margarita Ocasio

In 1972, Margarita Ocasio, then about 85 years old (Tr. 195), lived with her daughter Clara Ocasio (*id.*), who was present when Dr. Feldman treated the mother. (Tr. 197, 203). Dr. Feldman only treated Margarita Ocasio once or twice a month, and never treated her

* At an earlier time, Dr. Feldman had visited as often as once a week. (Tr. 80).

** Citations to "Perrotta Tr." refer to the transcript of the October 27, 1976 pre-trial videotaped deposition of Joseph Perrotta, which was played for the jury at trial. (Tr. 110).

six times in the course of 15 days. (Tr. 197). Yet Dr. Feldman billed for six home visits to Ms. Ocasio during the period from April 13 through April 28, 1972. (GX 165, Count 60).

Although Margarita Ocasio could not sign her name, but rather could only make a cross (Tr. 197-8), the 1490 bore her purported signature (GX 165) in script with no cross. And while Clara Ocasio sometimes signed documents for her mother next to her mother's cross (Tr. 198), Clara Ocasio did not sign the 1490. (Tr. 199, 277).*

The Defense Case

The defense presented four witnesses: Leo Berzety, Robert Schmidt, Evelyn Feldman, and the defendant, Dr. Feldman.

Berzety and Schmidt were both patients of Dr. Feldman who were named in the "military counts" (Berzety in Count 21 and Schmidt in Count 22). According to the contested 1490's, Schmidt had received a home treatment on Monday of the first week that Dr. Feldman was at Fort Lee, Virginia with Mrs. Feldman, and Berzety had been treated at home on Thursday of that same week. Neither man testified about the specific 1490 that was the subject of the indictment.

Berzety simply testified that Feldman came once or twice a week (Tr. 469) but that sometimes he wouldn't

* While Dr. Feldman himself probably wrote Margarita Ocasio's name (Tr. 277) just as he had forged Ms. Adams', Mr. Perrotta's and Mr. Roberts' signatures, in a non-custodial interview before he was indicted, Dr. Feldman had falsely said it was his practice to have his patients sign the 1490's. (Tr. 216-17).

come for two weeks in a row (Tr. 471). Berzety also testified that in the years Dr. Feldman had been treating him he (Berzety) received the reimbursement checks, and endorsed them over to Dr. Feldman (Tr. 469-70), and that the dollar amount of the checks corresponded to the number of visits. (Tr. 470). However, he admitted that the purported signatures of four * 1490's pertaining to him were not his. (Tr. 471-72).

Mr. Schmidt testified that Dr. Feldman came once a week, and sometimes more often. (Tr. 518). However, he acknowledged that sometimes Dr. Feldman was away for a week or two, for military duty. (Tr. 520-21). According to Mr. Schmidt, when he received the reimbursement checks from the Medicare program they seemed appropriate. (Tr. 519). However, he admitted that often he did not pay attention to the amounts since he was just signing the checks over to Dr. Feldman. (*Id.*).

Mrs. Feldman also testified in her husband's behalf. The crux of her testimony was that Dr. Feldman worked long hours that often ran until 11:30 at night (Tr. 334), that patients frequently called him at home (Tr. 338-339, 347), and that on one occasion he had taken a very sick alcoholic patient into the Feldman home for an evening. (Tr. 340).

Mrs. Feldman acknowledged that she went with her husband to Fort Monmouth, New Jersey (Tr. 336) and Fort Lee, Virginia (Tr. 337-38), and that when she was not with her husband at military camp, she took telephone messages from his patients for him. (Tr. 337).

* Although only one Berzety 1490 was referred to in the indictment, more than one 1490 had been submitted with respect to him. This was generally true of most patients named in the indictment.

Dr. Feldman testified in his own defense. The crux of his testimony was that as to each 1490 referred to in the indictment, as well as with respect to many other 1490's referring to the same and different patients, he had in fact rendered the services listed in the form, and had certified that he had done so. (Tr. 359, 361-62, 365, 366, 368-69, 398-419). In the case of Betty Friedman (Counts 2 and 29), he admitted that although the 1490 said the place of service was her home, he had *never* visited her home. (Tr. 391). Dr. Feldman testified that when he submitted the 1490's referred to in the indictment, he believed himself entitled to the amount of money set forth in the claim. (Tr. 363, 368-69).

Dr. Feldman also explained the illnesses and physical conditions for which he had treated the patients listed in the indictment. (Tr. 359-96). He stressed that he bought medication and supplies for his patients, and his personal checks reflecting payment for them were received in evidence. (Tr. 396-97).

On cross examination the government attacked Dr. Feldman's credibility. To this end, the government inquired about various 1490's beyond those referred to in the indictment and other insurance-type claims that Dr. Feldman had submitted. Dr. Feldman admitted that one Thomas Petty was in the Dutchess County Jail between October 5, 1974 and March 1975 (Tr. 419), but also contended that he (Dr. Feldman) had in fact rendered services to Petty as listed in 1490's which showed visits at Petty's "domicile" on approximately 26 days during the time Mr. Petty was in jail. (Tr. 413-14). Dr. Feldman further testified that he had also treated Mr. Petty on approximately 29 occasions as reflected on Medicaid (as distinguished from Medicare) forms (GX 277-283), which Dr. Feldman had signed. (Tr. 416). In fact Dr. Feldman expressly contended that he had treated Thomas

Petty "many, many times" in the jail. (Tr. 419). However, Dr. Feldman also admitted that on a previous occasion he had said under oath that he had only visited Mr. Petty once or twice in the jail (Tr. 420), and that he had billed Medicaid for taking Mr. Petty's Social Security check and sundries to him in the jail. (Tr. 423).

The government also probed the background of several bills submitted under medical insurance programs other than Medicare. In cross-examination, Dr. Feldman initially admitted that twice he had been reprimanded by the hospital where he worked for submitting claims for having treated employees four and five times when in fact he had treated each of those employees only once. (Tr. 454). As to one of the employees (Leonard Rabideau), Dr. Feldman admitted he had treated him only once (Tr. 460), but said he had treated the other patient, one Robert La Mere, on five occasions. (Tr. 461, 465, 468). Dr. Feldman contended that while he had only treated and visited Rabideau once and had billed for five "visits" (Tr. 468), he had performed other services for Rabideau such as research regarding his case history and preparing a letter applying for a disability pension (Tr. 464), and thus considered himself entitled to payment.

Government's Rebuttal Case

As its rebuttal case, the government introduced several oral stipulations as to charts, and called Robert La Mere, several witnesses to authenticate documents, and a witness to testify with regard to one chart. Mr. La Mere testified that Dr. Feldman treated him on only one date, when La Mere became ill at work. (Tr. 487-88). La Mere further explained that on the other dates for which Dr. Feldman had billed, he (La Mere) had been

in Sharon Hospital, and that Dr. Feldman had not visited him there. (Tr. 487).

John J. Farmer, Jr., Administrative Manager of the Dutchess County Jail (Tr. 474-75) authenticated the jail's visitors book, which reflected only one visit by Dr. Feldman during the time that Thomas Petty was in jail. (Tr. 476).

Another subject of the rebuttal case was Feldman's testimony that as to various 1490's not referred to in the indictment, as well as to those specifically mentioned, he had actually performed the services as described. To refute Dr. Feldman's credibility, the government introduced three charts (GX 401, 402, and 403, GA 3-5) to demonstrate in graphic form what Dr. Feldman's schedule would have been on three different days had the entries on particular 1490's been correct. On each of the illustrative days, Dr. Feldman had worked a full 8:30 a.m.-4:30 p.m. day at the hospital (GX 264, 265, 267), had attended an evening Army Reserve meeting from 7:00 p.m. to 11:00 p.m. (GX 224 A, B, and D), and purportedly had treated many private patients, mostly at their homes. The charts indicated the straight-line mileage between the patients' homes, and Postal Inspector Jeffrey Dupilka testified (Tr. 497-503) regarding how long it took to drive between the various points. Dr. Feldman had admitted that he spent 15 minutes to an hour with each patient. (Tr. 437). Because Dr. Feldman was home by 11:00 to 11:30 at night (Tr. 334), and because he had both hospital and military duties on each of the illustrative days, he could only have visited patients on his lunch hour, and between leaving the hospital and going to his reserve meeting. Yet assuming only 15 minutes for each visit and the shorest driving time, it would have taken more than seven hours to make all of one day's visits

(August 19, 1971—GX 401, GA 5), six hours for another (January 6, 1972—GX 402, GA 4), and seven hours for the third (August 10, 1972, GX 403, GA 3). Hence Dr. Feldman's testimony that he had indeed rendered the services as billed was patently incredible.

ARGUMENT

POINT I

Feldman Was Not Denied Effective Assistance Of Counsel On The Issue Of Preclusion Of A Defense Witness.

Feldman urges that the possible effects upon his defense of the ruling as to potential testimony of trial counsel's associate was not brought sufficiently to his attention to allow him to make a knowing waiver of the offered mistrial. That contention is specious. Nor has Dr. Feldman shown that any prejudice *actually* occurred as a result of the ruling; indeed, he has not pointed to any specific way in which trial counsel's conduct was "ineffective".

Jule Adams was the first patient to testify. Her testimony principally concerned the frequency of the treatments that Dr. Feldman had rendered to her. (Tr. 73-76). In cross-examination, defense counsel never attempted in any way to shake Ms. Adams' testimony regarding the number of visits. Rather, defense counsel did ask her questions regarding the ailments for which she had been treated (Tr. 84-91), and confronted her with apparent prior inconsistent statements about those illnesses made to defense counsel's associate, Betty Santangelo, Esq. (Tr. 84-91). When the prior statements were called to her attention, Ms. Adams acknowledged she might have made them. (*Id.*).

While the questions had concerned only collateral matters, the Government moved to preclude Ms. Santangelo from testifying about the prior statements (Tr. 93-107) on the grounds that such testimony would put defense counsel's credibility in issue, and violate DR 5-102 of the Code of Professional Responsibility. The Government's moving papers had been served on a Friday (Tr. 94-95), and after the defense considered the matter over the weekend, the motion was argued on Monday, November 1, 1976 (Tr. 93) in Feldman's presence.

Judge Conner ruled that he would permit defense counsel to question witnesses regarding what they had told Ms. Santangelo (Tr. 103) but would not permit Ms. Santangelo to testify if her firm continued as defense counsel. (See Tr. 99).^{*} However, the Court did suggest that if the testimony of Ms. Santangelo was "vital to the defense", the defendant should move for a mistrial (Tr. 99), so that with different counsel trying the case, the testimony could be admitted. (Tr. 105). The court made it clear that if a motion for a mistrial was to be made, it should be made immediately, as the probability of it being granted "is going to drop very, very sharply as we go along." (Tr. 106). The Government suggested, in front of Dr. Feldman, that defense counsel "should consult with his client and explain the circumstances, the consequences, and all the options available to Dr. Feldman". (Tr. 105-06). Defense counsel concurred in that suggestion and asked to spend "some time now with Dr. Feldman, so that all of this is very clear to him and that he can exercise the judgment that he wants to". (Tr. 106-07).

^{*} On appeal, Feldman does not claim that this ruling was erroneous. Indeed, he explicitly agrees that Ms. Santangelo's testimony would have been in violation of the Canons of Ethics. (Br. at 16).

When defense counsel and his client returned from that discussion, counsel carefully outlined on the record the areas that they had discussed. Rather than simply mentioning—as Feldman's brief implies—the impact a mistrial would have on the fee, counsel comprehensively covered the matters in issue:

Your Honor, I have spent the last five or ten minutes discussing this issue with Dr. Feldman. I told him as a result of your Honor's ruling we would not be able to ask the witnesses whether they have made certain statements to Miss Santangelo that would contradict their direct testimony.* Your Honor has ruled that Miss Santangelo would not be permitted to testify if those witnesses were to deny such statements. I told him that would give him a right if he wanted to at this moment to move for a mistrial, to obtain other counsel. I told him if this were to occur, we would, of course, refund to him any part of our fee that did not represent work that would of use to new counsel. I told him that that might end up with a delay of the proceedings for approximately a month or so, but then that the trial would be held, and, of course, Miss Santangelo would be available to testify for him if the witnesses were to deny statements made to her, that he then could count on Miss Santangelo's testimony here.

He said, considering all that, he is still agreeable to proceed at this time. (Tr. 107-08).

At counsel's suggestion, the Court ascertained directly from Dr. Feldman that counsel had discussed these

*In fact, the ruling was not that broad. The defense was permitted to ask the questions, as long as Ms. Santangelo was identified as an investigator rather than an associate or attorney.

matters and that Dr. Feldman nevertheless wished to proceed without a mistrial.* (Tr. 108).

The law is clear that when a trial court orders or offers a mistrial and the defendant chooses to continue with the trial, he is bound by that decision on appeal. *United States v. Estremera*, 531 F.2d 1103, 1110 (2d Cir.), cert. denied, 425 U.S. 979 (1976). Feldman was explicitly informed that he could move for a mistrial on the basis of the preclusion of Ms. Santangelo's testimony and expressly declined to accept it. The only question, then is whether he was deprived of effective assistance of counsel with respect to that choice.

The record clearly demonstrates that Feldman's decision was knowing, voluntary, and made after careful consideration of the alternatives. Given the length of the argument on the motion which the defendant had just heard, and recognizing that the defendant was a highly educated medical doctor, the inquiry conducted by the trial court clearly established that Feldman was fully aware of the choice he made. In the somewhat analogous area of assessing conflicts of interests when one lawyer or law firm represents multiple defendants, this Court has held that all that the trial court must do is insure that the defendant is "fully apprised" of the "facts underlying the potential conflict", and give the defendant "the opportunity to express his views". *Abraham v. United States*, 549 F.2d 236, 239 (2d Cir. 1977). See *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States v. Mari*, 526 F.2d 117, 119

* Mr. Martin: I think, your Honor, it might be helpful to ask Dr. Feldman if what I have said affirms the matters that I discussed with him and told him.

The Court: Do you affirm that, Dr. Feldman?

Defendant Feldman: Yes, I do, your Honor. (Tr. 108).

(2d Cir. 1975), *cert. denied*, 45 U.S.L.W. 3345 (1976). Here Judge Conner's actions more than met that test. Indeed, even on appeal Dr. Feldman does not contend that he was in fact in any way confused or poorly advised when he waived the mistrial.

Finally, even had the inquiry been unsatisfactory, there would nonetheless be no cause to reverse, since Dr. Feldman has shown no actual prejudice. As this Court has recently noted in the context of conflicts arising out of joint representation, "It is the rule that an appellant claiming a conflict by counsel must demonstrate some specific instance of prejudice . . . that would warrant vacature of his conviction." *Abraham v. United States*, *supra*, 549 F.2d at 239; see *United States v. Carrigan*, *supra*, 543 F.2d at 1055.

Here, defense counsel acknowledged that in view of Ms. Adams testimony, he did not think that he would call Ms. Santangelo. (Tr. 95). Since Ms. Adams had admitted making the remarks to Ms. Santangelo, and since the remarks were at any rate collateral at best, there was no need for Ms. Santangelo's testimony. Nor has Dr. Feldman pointed to any other witness' testimony that he could have rebutted through Ms. Santangelo. Since the military counts were proven on the basis of documents, Mrs. Feldman's testimony and Sgt. White's account of how long it took to drive to the various camps, Ms. Santangelo could not have been useful as to those counts. Similarly, the Leon Wilcox hospital counts were proven solely through documents.

Indeed, the only area where Ms. Santangelo's potential testimony could possibly have been helpful was with respect to interviews of patients and their friends and

relatives. Marion Paschier and Joseph Perrotta had already been questioned* prior to the Court's ruling. Nothing in the cross-examination of them suggests any prior inconsistent statement to Ms. Santangelo. John Roberts, Paul Friedman,** Clara Ocasio and Elizabeth Scott,*** who testified after the ruling, were not cross-examined at all regarding either statements to Ms. Santangelo or the frequency of Dr. Feldman's treatments, despite the court's clear ruling that such cross-examination would be permitted. Thus there was no need to call Ms. Santangelo as to their testimony; indeed, there is nothing in the record to indicate that these witnesses were even interviewed by Ms. Santangelo.

The cases cited by Feldman do not help him. The majority simply stand for the indisputable proposition that counsel, and indeed effective counsel, is a fundamental right. As the record shows, that legal verity simply does not apply to the facts of this case.

POINT II

Feldman's Convictions on the False Claims Counts Were Proper in all Respects.

A. The evidence of Feldman's guilt on the twenty "Runaway Billing" counts was overwhelming.

Four patients and the daughter of a fifth testified that Feldman had treated them far less frequently than he claimed on the invoices submitted to the Government for Medicare reimbursement. (Tr. 75-76, 187, 197; Paschier Tr. 4-5, 7; Perrotta Tr. 5). As to three patients, had the

* Paschier and Perrotta had been questioned in pre-trial videotape depositions.

** Paul Friedman is Betty Friedman's son.

*** Elizabeth Scott lived with Marion Paschier.

treatments been made as billed by Dr. Feldman, the experience would have been remarkable since the 1490's reflected that he had taken urine samples and performed urinalyses for them every other or third or fourth day for periods of a month or more. (GX 15, 16, 17, GX 22-27; GX 127). There was also testimony from a handwriting expert and some of the patients themselves that their signatures on the invoices prepared by Feldman were forgeries. (Tr. 76-78, 261-287, 188-187).

The indictment charged, in the twenty "runaway billing" counts, that these inflated claim forms submitted for these five patients violated the false claims act. 18 U.S.C. §287.* Apparently recognizing that the Government's proof of the falsity of his claims in these counts was more than ample, on appeal Feldman does not maintain that the evidence shows the forms he prepared were accurate. Instead, he asserts that the Government's proof was insufficient as a matter of law solely because it did not establish the specific entry on each form that rendered the form as a whole false.**

Feldman's contention, unsupported by any authority, betrays a misconception of the proof required to secure

* Counts 37-43 and 45-48 referred to separate forms submitted for payment for services allegedly rendered to Jule D. Adams, Count 50-55 referred to services allegedly provided to John Roberts, and Counts 56, 59 and 60 referred to services allegedly provided to Marion Paschier, Joseph R. Perrotta and Margarita Ocasio, respectively.

** Thus, defense counsel argued at the close of the Government's case that

"The Government has not offered any proof to show that on the specific days contained in the individual claim forms that are set forth in the indictment that Dr. Feldman did not perform services on any one of those specific days in the claim form. It seems to me they have to do that. . . ." (App. 63a).

a conviction of presenting false claims to the Government. All that § 287 requires is evidence that the doctor has presented a claim upon the Government "knowing such claim to be false, fictitious or fraudulent." In this case, in each invoice described in the "runaway billing" counts the total payment Feldman requested was exaggerated and fraudulent, for the proof established that some, though concededly not all, of the treatments included on the invoice—which determined the total amount claimed—were fictions of Feldman's own devising. Thus, the proof of the presentation of a false claim and Feldman's knowledge of the falsity was complete, and submission of the case to the jury was fully warranted.

An additional requirement that evidence be elicited to establish which of the treatments were the false ones and which the legitimate is not only not required by the statute or by any judicial decision, but would essentially deprive the Government of its ability to rely upon circumstantial evidence in proving the falsity of a Medicare claim.* Yet such a mode of proof has won repeated judicial approval. For example, the evidence in *United States v. Katz*, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972), a Medicare fraud prosecution under the false statements

* Indeed, in denying Feldman's motion for acquittal, Judge Conner cogently reasoned that

... we have here elderly patients who cannot remember four years later the specific dates on which they were visited by the doctor. They can only remember that they only saw him two or three or a limited number of times. Therefore, it would be impossible for the government to prove which of the thirty or forty or fifty claim dates is false and which is true. They can only prove that the patient was not visited on all the dates claimed in the particular invoice, and I think to hold them to any strict standard of proof would be to allow, indeed invite, the very kind of fraud that the prosecution is designed to prevent. (App. 67A-68a).

statute, 18 U.S.C. § 1001 (1970), was nearly identical to that in this case. Katz, a physician, was charged with billing for and receiving Medicare payments for non-existent hospital visits for each day that a patient was hospitalized. The patients and their relatives testified that the treatments had not been made so frequently. One nurse testified that Katz visited patients at most on two out of three days, and another averred that Katz was able to treat some twenty-five patients in twenty minutes. 455 F.2d at 468. Against Katz's argument that this evidence was insufficient for conviction, the Fifth Circuit held that the case was properly sent to the jury, which resolved the issues against him. *Id.*

A similar result was reached in *United States v. Smith*, 523 F.2d 771 (5th Cir. 1975), cert. denied, 45 U.S.L.W. 3249 (Oct. 5, 1976). Smith, a hospital proprietor, was convicted of making false statements in seeking Medicare reimbursement for his hospital by submitting hospital expense reports which fraudulently included non-reimbursable costs. Smith contended that the forms, and the hospital's books, were so complex that he could not know precisely where the forms he prepared went wrong. Noting that Smith "does not argue in this respect that the forms were correct," the Court held that "[i]t is not necessary that Smith have known which line was incorrect when he approved the forms," so long as he understood they included expenses not legitimately subject to reimbursement by the Government. 523 F.2d at 780.

Thus, in neither *Katz* nor *Smith* was the Government required to prove—as the unprecedented theory Feldman espouses would mandate—the exact entry that gave rise to the falsity of the claim submitted to Medicare. In this respect, the requisite quantum of proof is analogous to that established in prosecutions for filing false tax returns. In those cases, the Government is entitled to rely upon the inference that an unexplained excess in funds,

revealed by the net worth or bank deposits method of proof, is attributable to income that was subject to tax. *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Slutsky*, 487 F.2d 832, 841 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). It need establish neither the exact amount of such income nor its precise source. 487 F.2d at 482. As in the false Medicare claim case, what is significant is the filing of a false return, not the exact particular that renders it false.* Similarly, and of particular relevance to this case, in a perjury prosecution, "where there are several specifications of falsity in a single count, proof of any of the specifications is sufficient to support a verdict of guilty." *United States v. Bonacorsa*, 528 F.2d 1218, 1222 (2d Cir. 1976). Indeed, "it is customary, and ordinarily not improper, to include more than one allegedly false statement in a single count." *Id.* at 1221.

It follows that the evidence on each of the "runaway billing" invoices was sufficient.**

* Any other result would defy common sense. Surely a doctor, having submitted an invoice seeking reimbursement for the alleged treatment on a single day of half the population of New York City, could not complain if the case were submitted to the jury without proof of which of the four million entries were false and which represented the few legitimate provisions of service.

** While his argument in this regard is confused, Feldman also appears to rely on this Court's decision in *United States v. Natelli*, 527 F.2d 311 (2d Cir.), *rev'd in part on rehearing*, 527 F.2d 327 (2d Cir.), *original opinion reinstated*, 527 F.2d 328 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), for the twin propositions that the District Court erroneously declined to give Feldman's Request to Charges # 12 and that the evidence on the "run-away billing" counts was insufficient. His reliance is misplaced.

With respect to the request to charge, Feldman asked the trial judge to instruct the jury that they must unanimously

[Footnote continued on following page]

B. The evidence of Feldman's guilt on the "military" and "hospital" false claims count was also amply sufficient.

Feldman's arguments challenging his conviction on the twenty "runaway billing" counts do not apply to his conviction on twenty-three other counts of presenting false claims. The proof on each of those latter counts estab-

determine with respect to each fraudulent invoice which of the entries reflected legitimate services and which were frauds. This case differs from *Natelli* in that the Government had no need to particularize its proof as to which specific treatment dates on any given invoice charged in the "runaway billing" counts were false. Consequently, the jury also had no duty to—and doubtless did not—determine the validity of each such date, unanimously or otherwise.

More significantly, Feldman's reliance on *Natelli* with respect to his attack on the sufficiency of the evidence is fundamentally incorrect. In *Natelli*, the Government chose to incorporate in one count two independent means of committing the same offense; each allegation could have been the subject of a separate count. 527 F.2d at 329. This Court held that since the evidence as to one defendant on one of the false statements was insufficient, "the verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved." *Id.* at 325. Here, of course, each count related only to one specific false invoice; indeed, had separate counts been alleged for each false statement in each invoice, the indictment would have been highly vulnerable to a claim of multiplicity. *United States v. UCO Oil Co.*, Dkt. No. 76-2141, slip op. at 8 (9th Cir., Dec. 13, 1976), *petition for cert filed*, No. 76-967, 45 U.S.L.W. 3575 (Feb. 22, 1977); *United States v. Sahley*, 526 F.2d 913, 918 (5th Cir. 1976). Furthermore, the sufficiency of the Government's case did not rest on a demonstration that any one of the discrete factual underpinnings of each invoice was false, but that the total amount claimed was in fact fraudulently increased. As to this, there is simply no view of the evidence that would have permitted a verdict contrary to that returned by the jury.

lished that Feldman could not possibly have treated patients at their homes on particular dates claimed on the invoices, either because he was hundreds of miles away from the patients at military reserve camp (the "military counts"), or because the patients were confined to a hospital and were not attended by Feldman there (the "hospital counts").

While Feldman's appellate counsel does not directly challenge the sufficiency of this evidence, his trial counsel argued that the jury could not reasonably infer that Feldman did not commute from army camp in southern New Jersey and Virginia to treat patients in Beacon, New York. (Tr. 325-327). Particularly since there was specific evidence (from Feldman's wife, for example) that Feldman was in Fort Lee, Virginia, on the very day that he claimed to have treated a patient in New York (Tr. 337-38, 344), this argument was clearly for the jury.*

* While Dr. Feldman could leave camp on the middle weekend of his two-week reserve duty, he had to be there on the first weekend and also from 6:30 A.M. to 4:30 P.M. on weekdays. Each 1490 form referred to in the military counts contains a billing for at least one purported treatment on the first weekend or during the week, although some also include billings for services on the middle weekend. Judge Conner's remark, quoted in Feldman's brief, that "I think you have quite a persuasive argument that the government has not sustained its burden beyond a reasonable doubt" (Tr. 327; Br. 17) followed a discussion of whether Dr. Feldman could have commuted back to Beacon on the *middle* weekend (326-327), and in no way referred to the proof as to services allegedly rendered the first weekend or on the weekdays, or, as Feldman's Brief might imply, to the Government's proof generally.

POINT III**The Court Properly Admitted Testimony That Feldman Refused To Give Handwriting Exemplars And That He Could Give No Explanation For The Signatures On The 1490 Forms.**

In July 1973, long before he was indicted, Feldman made a statement to Saverio DeRosa of the Bureau of Health Insurance. Feldman had not been placed under arrest, nor was he detained or under threat of detention. Rather, in response to an invitation made by letter, Dr. Feldman came to DeRosa's office where, prior to asking questions, DeRosa advised him of his right to remain silent and "to stop the questioning at any time that he saw fit and to retain counsel". (Tr. 213-14).^{*} Feldman did not choose to remain silent. Instead, he proceeded to answer the questions DeRosa asked him.

During the course of the interview, when DeRosa asked Feldman about the signatures on the 1490 Forms, "he (Feldman) could not explain why there was a question about the signatures." (Tr. 218). On appeal,^{**} Dr. Feld-

^{*} Since the questioning was non-custodial, the advice of rights was gratuitous. *Beckwith v. United States*, 425 U.S. 341 (1976). See also *Oregon v. Mathiason*, 45 U.S.L.W. 3505 (U.S. January 25, 1977); *United States v. Clark*, 525 F.2d 314, (2d Cir. 1975).

^{**} The pre-trial motion to suppress was grounded solely on the contention that there was no knowing and voluntary waiver of the presence of counsel. While the case was assigned to him, Judge Palmieri denied the motion. (Oct. 15, 1976 pre-trial conference). Feldman's failure to raise his present claim, now raised for the first time on appeal, that *Doyle v. Ohio*, 426 U.S. 610 (1976) barred use of the statement, precludes consideration on appeal. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773, 2779 (2d Cir. April 11, 1977); *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976).

man incorrectly characterizes this response as a "negative fact." Explicitly stating that one has "no explanation" for an alleged fact is simply not the same as invoking one's right to remain silent. Thus *Doyle v. Ohio*, 426 U.S. 610 (1975); *United States v. Hale*, 422 U.S. 171 (1975); and *United States v. Harp*, 536 F.2d 601 (5th Cir. 1976), upon which Feldman relies, have no application. Indeed, Feldman's response was not "insolubly ambiguous," *Doyle v. Ohio*, *supra*, 426 U.S. at 617, but was an answer and an admission and as such was properly admitted into evidence.

DeRosa also asked Feldman to provide handwriting exemplars by signing his own and some of his patients' names. Feldman agreed with the first request and refused the second. (Tr. 218-20). At that point, Feldman did not ask DeRosa to stop the questioning so he could retain counsel. Instead, he continued to waive his right to do so and without interruption answered other questions asked of him.

While Feldman had the right to remain silent, he had no right to withhold handwriting exemplars.* "[A] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside (the Fifth Amendment's) protection." *Gilbert v. California*, 388 U.S. 263, 266-67 (1967). See also *United States v. Mara*, 410 U.S. 19, 21 (1973); *United States v. Doe (Schwartz)*, 457 F.2d 895 (2d Cir. 1972). Thus, *Doyle*, *Hale* and *Harp* are not on point, since Dr. Feldman had no constitutionally protected right that he could conceivably have been asserting. Feld-

* Indeed, in pre-trial proceedings, he was ordered to give exemplars of his writing of the patients' names (October 15, 1976 pre-trial conference).

man cannot claim that his "silence" has been used against him when no right to remain silent exists with regard to handwriting exemplars. Thus his refusal to give certain handwriting exemplars, but not others, was clearly evidence of consciousness of guilt and not an assertion of a privilege.

Finally, even if the admission of the responses to either or both of DeRosa's questions constituted error—which the government submits that it was not—the error was harmless under this Court's standard that "the unchallenged evidence presented against [defendant] in his trial was sufficiently overwhelming to have precluded by itself the possibility of his acquittal." *United States v. Williams*, 523 F.2d 407, 409-10 (2d Cir. 1975) (admission into evidence of defendant's silence at arrest was harmless error). The documents and witnesses showed that the 1490's were false whether or not the patients' signatures were forged. And without regard to Dr. Feldman's initial response to the request for exemplars, the handwriting expert's testimony based on exemplars provided later supported the inference that Dr. Feldman had in many cases himself forged the signatures. Finally, of course, Dr. Feldman himself testified, and was available to give his own version of the events.* It is thus ludicrous to suggest that it was DeRosa's testimony rather than the powerful weight of the other evidence that led the defendant to take the stand. (Br. 22).

* Feldman's claim, Brief at 22, that this evidence "may have compelled defendant to take the stand" is absurd. While Feldman did in fact testify and was thus *available* to explain his refusal to give the exemplars, he never once on direct or cross-examination ever mentioned the issue.

POINT IV

The Lapse Of Time Between Submission Of The 1490's And Indictment Was Not The Result Of Any Tactic By The Government, Nor Has Feldman Shown That It Prejudiced Him; Hence It Does Not Mandate Reversal.

When it was filed on January 15, 1976, the indictment charged false claims or mail fraud violations with respect to fifty 1490's dated from 1971 through 1975. Because the interval between the submission of the false 1490's and the filing of the indictment was not the result of any deliberate, malevolent tactical move by the government and because Dr. Feldman has not demonstrated any specific actual prejudice which he suffered as a result of the lapse, Dr. Feldman's arguments under *United States v. Marion*, 404 U.S. 307 (1971), and related cases are without merit.*

The Government has steadily maintained that to claim a *Marion* violation, the defendant must show *both* that the delay has caused substantial prejudice to his case *and* that the delay was an intentional device used to gain tactical advantage over him. *United States v. Marion*, *supra* at 324. Feldman appears to claim that a showing of prejudice alone is sufficient to require dismissal. (Br. 27). However, this Court has recently, and repeatedly, stated that it has not resolved the issue of whether the *Marion* requirements are to be read in the conjunctive or the disjunctive. See *United States v. Vispi*, 545 F.2d 325, 332 (2d Cir. 1976) and cases cited

* At any rate, as Feldman recognizes, Br. at 23, these claims could at most apply to those counts based upon events prior to Feldman's interview in July 1973.

therein; *United States v. Finkelstein*, 526 F.2d 517, 525 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1977); but see *United States v. Mejias*, Dkt. No. 76-1384, slip op. 2269, 2284 (2d Cir. March 10, 1977) (burden is on defendant to show both "substantial prejudice" and an "intentional" tactical delay by the Government). While the Government maintains that both logic and the language of the *Marion* opinion clearly require a reading of the operative language in the conjunctive, this Court need not resolve that issue in this case since Feldman has shown neither deliberate delay nor actual prejudice.

Before trial, without in any way asserting that the delay was a deliberate act of the government, Dr. Feldman moved to dismiss on the grounds of pre-indictment delay, not seeking an immediate resolution but rather simply to preserve the issue to be re-asserted if "on the basis of facts developed at trial", Dr. Feldman could "show there has been actual and irreparable prejudice" to him. (Feldman Pre-Trial Memorandum of Law accompanying Notice of Motion dated June 29, 1976.) But even after trial, Dr. Feldman has not been able to point to one instance of actual prejudice. Rather, all that he contends is that both his recollection and that of his patients is now hazy. (Br. 23-24). This Court has repeatedly held, however, that a mere claim of hazy recollection is insufficient to meet the actual prejudice test of *Marion*. See *United States v. Payden*, 536 F.2d 541, 544 (2d Cir. 1976) (Per curiam); *United States v. Foddrell*, 523 F.2d 86-88 (2d Cir. 1975).*

* Under the circumstances of this case, it is particularly difficult to imagine how Dr. Feldman's case—as distinguished from that of the government—would have been aided had the patients' recollections been more precise. The bulk of the military counts were proven largely by documents showing the phys-

[Footnote continued on following page]

Indeed, the very fact that the poorer the recollection, the more the defendant was benefitted is an indication that the lapse between the events and the indictment was not the result of a diabolical scheme by the government. As the affidavits submitted by the government in response to the pre-trial motions demonstrated, the government was painfully aware that as time passed, the elderly patients upon whom the prosecution's case depended might die or become otherwise unable to testify, or their recollections might falter (§ 4, Affidavit of Richard J. Hoskins, August 16, 1976; § 10, Affidavit of Irving Howard, August, 1976).

ical impossibility of Dr. Feldman having made visits in the Beacon area while he was on military duty elsewhere. The patients could hardly have been expected to testify that he was with them, when the documents, and even his own wife's testimony, showed he was miles away. Similarly, as to the hospital counts, the most that the patients could have been expected to say was that Dr. Feldman had visited them socially, as distinguished from treating them medically, while in the hospital. Such testimony would not have contradicted the hospital records which did not in any way indicate that Dr. Feldman had rendered any treatment to the patients while in the hospital. Indeed, Paul Stamps (Tr. 174) *did* recall a social visit, and so testified. That visit, however, did not make the claim for having performed *treatment* any less false.

It was only on the "runaway billing" counts where greater patient recollection might have had an impact; we submit that that impact could only have been in favor of the government. Hence *Dr. Feldman* was not prejudiced. In direct examination, the patients did not and could not say that they had *not* been treated on any particular date. Rather, they only testified that they had been treated with some particular frequency, and had never been treated with greater frequency. Since the government had the heavy burden of proving Dr. Feldman's guilt, the lack of specific recollection by Government witnesses was a clear *advantage* to Dr. Feldman, which he fully exploited in his arguments on the motion to dismiss (Tr. 319, 325-26); in his summation (Tr. 564-65); and in his brief to this Court, at 17.

Finally, legitimate prosecutorial preparation caused the delay. Dr. Feldman himself was interviewed in 1973, as were some patients, and those preliminary efforts led to wider investigations into Dr. Feldman's affairs. (Howard Aff., *supra*, ¶ 10-11). *United States v. Robinson*, 543 F.2d 951, 961 (2d Cir. 1976); *United States v. Schwartz*, 535 F.2d 160, 164 (2d Cir. 1976). Moreover, because of the infirm status of many patients, and because certain patients' conditions had deteriorated after initial interviews, the presentation of the case to the grand jury was particularly difficult. (Hoskins Aff., *supra*, ¶ 3).

Hence Dr. Feldman has no basis to seek reversal on the grounds of denial of due process under the Fifth Amendment.*

POINT V

Feldman's Conviction Of Mail Fraud Was Proper.

As an integral part of his scheme to defraud the Government, Dr. Feldman submitted all his vouchers by mail to Medicare authorities for payment. (Tr. 130-31, 136-38, 360, 369). Payment for these fraudulent invoices was received by check. (Tr. 136, 369). Yet Feld-

* Dr. Feldman's reliance on a Sixth Amendment argument is even more misplaced. The Sixth Amendment right to a speedy trial does not attach until "the defendant assumes the status of an 'accused', *United States v. Marion*, 404 U.S. at 313, 92 S.Ct. 455, which usually occurs upon arrest or indictment, whichever event first occurs." *United States v. Vispi*, *supra* at 331. See also *Dillingham v. United States*, 423 U.S. 64 (1975) (*per curiam*). This Court has recently held that a non-custodial interview does not commence the period. See *United States v. Vispi*, *supra* at 331. Thus, *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965), cited by Dr. Feldman, is not the law of this Circuit.

man contends that the mail fraud counts for which he was convicted must be dismissed because mail sent to the Government cannot form the basis for mail fraud, and that since Feldman could be charged for other violations,* the mail fraud counts were duplicitous. These arguments are incorrect.**

Feldman's one-sentence contention that mail fraud violations cannot be combined with other violations of federal law is simply incorrect. The mail fraud provision has often been employed to prosecute persons who broke other federal laws. *Pereira v. United States*, 347 U.S. 1 (1954) (interstate transportation of stolen property); *Edwards v. United States*, 312 U.S. 478 (1941) (Securities Act); *United States v. Green*, 494 F.2d 820 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (Truth in Lending Act); *Bozel v. Hudspeth*, 126 F.2d 585 (10th Cir. 1942) (Federal Trade Commission Act). Furthermore, it has always been the law that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Gore v. United States*, 357 U.S. 286, 288 (1958). The facts of this case clearly meet that test.

* As the indictment was sent to the jury, one mail fraud count (count 10) had no false claims counterpart.

** Feldman does not appear to argue, nor could he, that the use of the mail was not sufficiently central to his fraudulent scheme to violate the statute as construed in *United States v. Maze*, 414 U.S. 395, 400 (1974). Since the mailed vouchers were the essence of the fraud, such a contention would be absurd. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773, 2782-83 (2d Cir. April 11, 1977); *United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737, 1738-43 (2d Cir. Feb. 8, 1977); *United States v. Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

For his second and equally frivolous contention that the mail fraud statute is inapplicable to frauds upon the Government, Feldman relies entirely upon Judge Weinfeld's decision in *United States v. Henderson*, 386 F. Supp. 1048, 1052 (S.D.N.Y.), ignoring both the legal and factual distinctions presented by this case. In *Henderson*, Judge Weinfeld ruled that where the indictment charged tax evasion under the express provisions of Title 26, it was improper also to charge that the mailing to the IRS of the fraudulent tax return also violated the mail fraud statute.

Feldman's disingenuous contention that mail fraud proscriptions do not apply in this case because the Government rather than a private citizen is the aggrieved party of the doctor's fraud ignores Judge Weinfeld's express recognition that when the Government purchases goods or services, as in this case, the mail fraud provisions do apply. *United States v. Henderson*, *supra*, 386 F. Supp. at 1053, citing, *Bradford v. United States*, 129 F.2d 274 (5th Cir. 1942); *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941); *Hartwell v. United States*, 107 F.2d 352 (5th Cir. 1939). The Medicare compensation program is simply an attempt by the Government to insure medical treatment for a class of individuals apt to be otherwise unable to obtain treatment because of financial pressures experienced as they become aged. (See Tr. 50). The Government then pays the doctors who render the services to the patients. (Tr. 31). In effect, the Government is purchasing services for its citizenry for which it reimburses the rendering physician; thus, Dr. Feldman's use of the mails to defraud the Government in that function falls with the explicit exception noted by Judge Weinfeld.

Another element of the rationale in *Henderson* is inapplicable here. Clearly disturbing to Judge Weinfeld

was the use of what he perceived as superfluous mail fraud counts when an elaborate remedial statutory scheme was already available under the tax laws. There are no comprehensive criminal provisions aimed expressly at Medicare fraud. The only statute specifically applicable is 42 U.S.C. § 1396h(8), which makes the conduct alleged in the indictment punishable as a misdemeanor. However, the government instead chose to charge the general false claims statute, which proscribes a harsher maximum penalty. This course of action was entirely proper. See *United States v. Eisenmann*, 396 F.2d 565, (2d Cir. 1968); *United States v. Chakmakis*, 449 F.2d 315 (5th Cir. 1971); see e.g., *United States v. Burnett*, 505 F.2d 815, 816 (9th Cir. 1974), cert. denied, 420 U.S. 978 (1975); *United States v. Clearfield*, 358 F. Supp. 564 (E.D.N.Y.); *United States v. Matanky*, 346 F. Supp. 116 (C.D. Cal. 1972).*

Indeed, in an unreported decision, Judge Milton Pollock of the District Court refused to apply *Henderson* in a Medicare case involving both mail fraud and false statements (18 U.S.C. 1001) counts. See *United States v. March*, 76 Cr. 114 (S.D.N.Y., May 7, 1976).

The use of the mail fraud provisions in this context was entirely proper to protect the citizenry from the type of gross fraud practiced by Dr. Feldman's use of the mails.

* Moreover, the government urges that even if the *Henderson* rationale were applicable here, that case was wrongly decided. To the best of government counsel's knowledge, neither this nor any other Court of Appeals has adopted *Henderson*. In fact, despite the contrary language of Judge Weinfeld's opinion, there is some authority that even if a penalty for tax abuses exists, it is entirely proper to charge a violation of the mail fraud provisions if those provisions also apply. *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States v. Melvin*, 544 F.2d 767, 773-777 (5th Cir. 1977); *United States v. Mirabile*, 503 F.2d 1065, 1066 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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RHEA KEMBLE NEUGARTEN,
RICHARD F. ZIEGLER,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

JULE D. ADAMS
1972 (1st 6 Months)

A-1

EXHIBIT NUMBER	DATE OF CLAIM	DATE OF SERVICE		PLACE OF SERVICE
		DATE	DAY	
12	1/19/72	1/1	SATURDAY	HOME
		1/3	MONDAY	HOME
		1/5	WEDNESDAY	HOME
		1/7	FRIDAY	HOME
		1/9	SUNDAY	HOME
		1/11	TUESDAY	HOME
		1/13	THURSDAY	HOME
		1/15	SATURDAY	HOME
		1/17	MONDAY	HOME
		1/19	WEDNESDAY	HOME
13	2/13/72	1/21	FRIDAY	HOME
		1/24	MONDAY	HOME
		1/27	THURSDAY	HOME
		1/31	MONDAY	HOME
		2/4	FRIDAY	HOME
		2/7	MONDAY	HOME
		2/10	THURSDAY	HOME
		2/13	SUNDAY	HOME
14	3/13/72	2/15	TUESDAY	HOME
		2/18	FRIDAY	HOME
		2/21	MONDAY	HOME
		2/24	THURSDAY	HOME
		2/28	MONDAY	HOME
		3/2	THURSDAY	HOME
		3/5	SUNDAY	HOME
		3/8	WEDNESDAY	HOME
		3/13	MONDAY	HOME
15	4/11/72	3/16	THURSDAY	HOME
		3/19	SUNDAY	HOME
		3/22	WEDNESDAY	HOME
		3/25	SATURDAY	HOME
		3/28	TUESDAY	HOME
		3/31	FRIDAY	HOME
		4/2	SUNDAY	HOME
		4/5	WEDNESDAY	HOME
		4/8	SATURDAY	HOME
		4/11	TUESDAY	HOME
25	4/23/72	4/14	FRIDAY	HOME
		4/17	MONDAY	HOME
		4/20	THURSDAY	HOME
		4/23	SUNDAY	HOME
26	5/14/72	4/26	WEDNESDAY	HOME
		4/29	SATURDAY	HOME
		5/2	TUESDAY	HOME
		5/5	FRIDAY	HOME
		5/8	MONDAY	HOME
		5/11	THURSDAY	HOME
		5/14	SUNDAY	HOME

JULE D.ADAMS

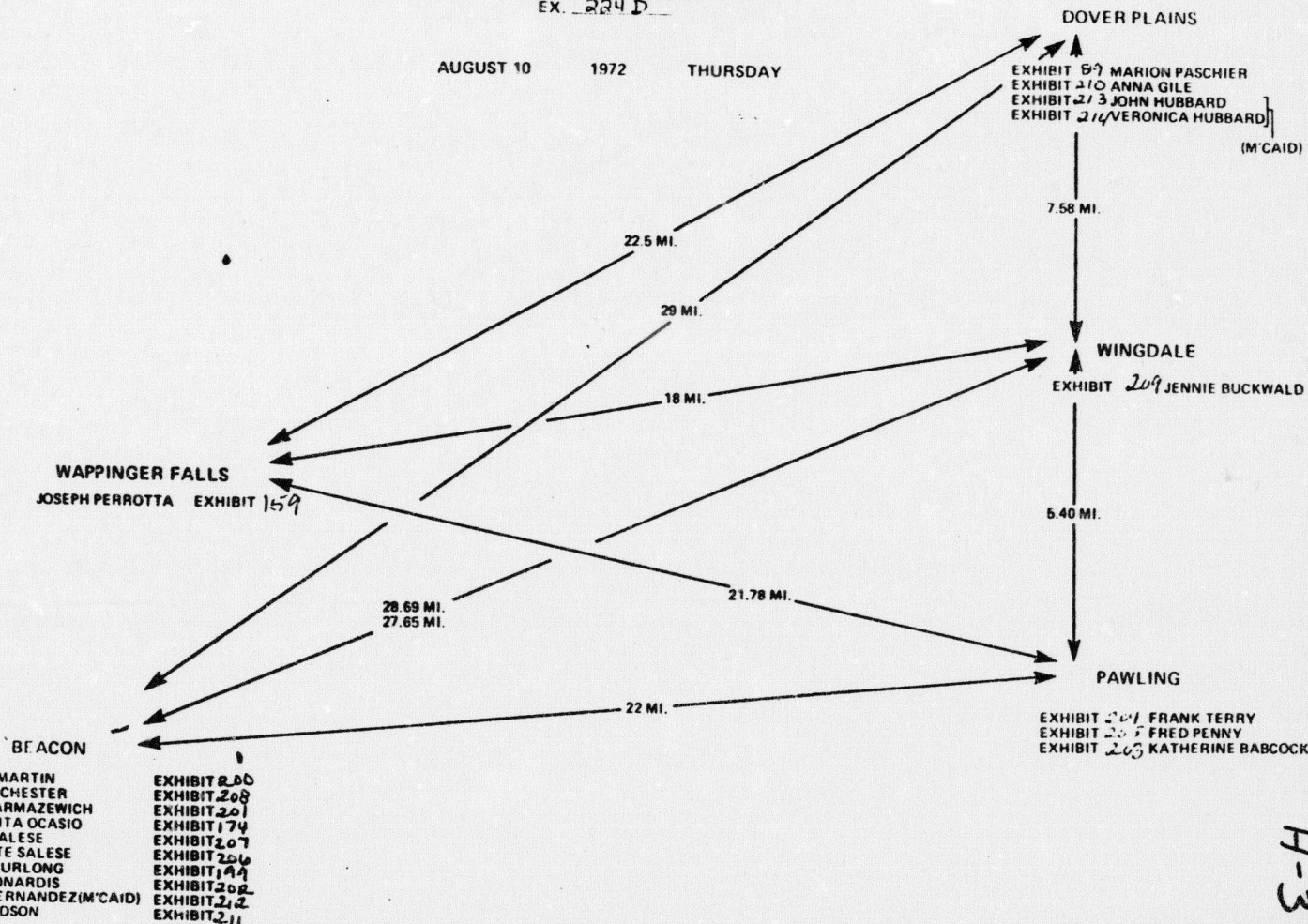
A-2

EXHIBIT NUMBER	DATE OF CLAIM	DATE OF SERVICE		PLACE OF SERVICE
		DATE	DAY	
16	6/6/72	5/17	WEDNESDAY	HOME
		5/20	SATURDAY	HOME
		5/23	TUESDAY	HOME
		5/26	FRIDAY	HOME
		5/29	MONDAY	HOME
		6/3	SATURDAY	HOME
		6/6	TUESDAY	HOME
17	6/18/72	6/9	FRIDAY	HOME
		6/12	MONDAY	HOME
		6/15	THURSDAY	HOME
		6/18	SUNDAY	HOME
18	6/30/72	6/21	WEDNESDAY	HOME
		6/24	SATURDAY	HOME
		6/27	TUESDAY	HOME
		6/30	FRIDAY	HOME

DUTY HOURS HARLEM VALLEY STATE HOSPITAL
AUGUST 10 1972 8:30 A.M. TO 4:30 P.M.
EX. 267

DUTY HOURS U.S. ARMY RESERVE
7:00 P.M. TO 11:00 P.M.
EX. 224 D

AUGUST 10 1972 THURSDAY



A-3

DUTY HOURS HARLEM VALLEY STATE HOSPITAL
JANUARY 6, 1972 8:00 A.M. TO 4:30 P.M.
EX. 265

DUTY HOURS U.S. ARMY RESERVE
7:00 P.M. TO 11:00 P.M.
EX. 224 B

JANUARY 6 1972 THURSDAY

DOVER PLAINS

EXHIBIT '77 MARION PASCHIER
EXHIBIT 2K ANNA GILE

7.58 MI

WINGDALE

EXHIBIT 215 JENNIE BUCKWALD
EXHIBIT 212A ANNA VANCE

22.16 MI.

DOUGHKEEPSIE

EXHIBIT 215A

7 MI.

16.38 MI.

WAPPINGER FALLS

EXHIBIT 148 JOSEPH PERROTTA
EXHIBIT 216A MARTINET

8.71 MI.

BEACON

ANITA DODSON
WILLIAM CHESTER
HARRIET CHESTER
FANNIE EISNER
PHILIP EISNER
HERBERT RIDLEY
MARY CURTIS
MARGARITA OCASIO

EXHIBIT 213A
EXHIBIT 214A
EXHIBIT 211A
EXHIBIT 220
EXHIBIT 217
EXHIBIT 219
EXHIBIT 218
EXHIBIT 166

2.5 MI.

27 MI.

21.59 MI.

18 MI.

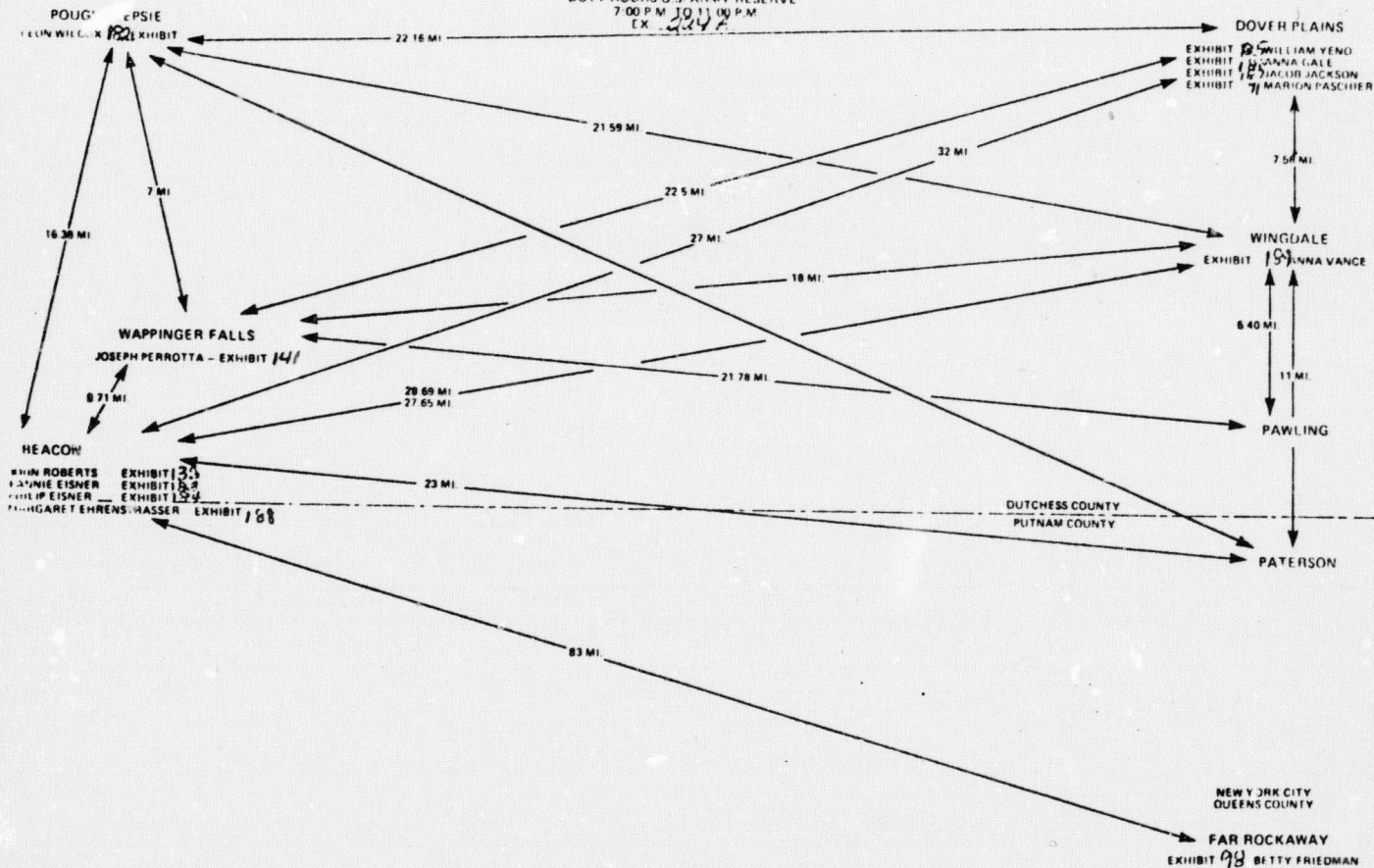
28.69 MI.

27.65 MI.

R-4

AUGUST 19 1971 THURSDAY

DUTY HOURS HARLEM VALLEY STATE HOSPITAL
AUGUST 19, 1971 8:00 A.M. TO 4:30 P.M.
EX 304
DUTY HOURS U.S. ARMY RESERVE
7:00 P.M. TO 11:00 P.M.
EX 304



1A-5

A-6
212189-176-40
Type or Print Information) For Approved Budget Bureau No

Form Approved 40
Budget Bureau No.
72-RO730

PAVING - PATENTED HERE IN ITEM SENT BOYS ON MAY

7	A. Date of each service	B. Place of service (*Use Codes below)	C. Fully describe surgical or medical procedures and other services or supplies furnished for each date given	D. Nature of illness or injury requiring services or supplies	E. Charges (if re- lated to unusual circumstances explain in 7D)	Leave Blank
	JUNE 21, 24, 27, 30 1972	H	ADMINISTRATIVE CHECKS ADMINISTRATION OF MEDICATION	ESSENTIAL HYPERTENSION DIABETES MELLITUS PULMONARY INFECTION	\$ 40.00	
	JUNE 21, 24 27, 30, 1972	H	URINALYSES	DIABETES	\$ 0.00	
			50. Under Title 6 paid in 1972 for prior services			
			SF0622681			
8	Name and address of physician or supplier (Number and street, city, State, ZIP code)			Telephone No.	9 Total charges	
	Seymour C. Feldman, M. D. 620 Wolcott Avenue Beacon, New York 12508				10 Amount paid	\$ 45.00
	Physician or supplier code				11 Any unpaid balance due	\$ 0.00
12	Assignment of patient's bill (See reverse)			13 Show name and address of facility where services were per- formed (if other than home or office visits)		
	<input checked="" type="checkbox"/> I accept assignment <input type="checkbox"/> I do not accept assignment					
14	Signature of physician or supplier (A physician's signature certifies that physi- cian's services were personally rendered by him or under his personal direction)			<input type="checkbox"/> MD <input type="checkbox"/> DO <input type="checkbox"/> DDS Other degree _____	Date signed 6/30/1972	

35300

USA 33c - 475
(E.D. 4-23-71)

GOVERNMENT'S

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

-137d-

BEST COPY AVAILABLE

A-7.

HOW TO FILL OUT YOUR MEDICARE FORM

There are two ways that Medicare can help pay your doctor bills

One way is for Medicare to pay your doctor.—If you and your doctor agree, Medicare will pay him directly. This is the assignment method. You do not submit any claim; the doctor does. All you do is fill out Part I of this form and leave it with your doctor. By this method the doctor agrees to accept the charge determined by the Medicare carrier as the full charge; you are responsible for the deductible and coinsurance. Please read Your Medicare Handbook to help you understand about the deductible and coinsurance. (Because Medicare has special payment arrangements with group practice prepayment plans these plans handle claims for covered services they furnish to their members.)

Another way is for Medicare to pay you.—Medicare can also pay you directly—before or after you have paid your doctor. If you

submit the claim yourself, fill out Part I and ask your doctor to fill out Part II. If you have an itemized bill from him, you may submit it rather than have him complete Part II. (This form, with Part I completed by you, may be used to send in several itemized bills from different doctors and suppliers.) Bills should show who furnished the services, the patient's name and number, dates of services, where the services were furnished, a description of the services, and charges for each separate service. It is helpful if the diagnosis is also shown. Then mail itemized bills and this form to the address shown in the upper left-hand corner, Block A. If no address is shown there, use the address listed in Your Medicare Handbook—or get advice from your nearest social security district office.

THINGS TO NOTE IN FILLING OUT PART I (Your doctor will fill out Part II).

- 1** Copy the name and number and indicate your sex exactly as shown on your health insurance card. Include the letters at the end of the number.
- 2** Enter your mailing address and telephone number, if any.
- 3** Describe your illness or injury. Be sure to check one of the two boxes.
- 4** If you have other health insurance or expect a welfare agency to pay part of the expenses, complete item 5.
- 5** Be sure to sign your name. If you cannot write your name, sign by mark (X), and have a witness sign his name and enter his address on this line.

If the claim is filed for the patient by another person he should enter the patient's name and write "By", sign his own name and address in this space, show his relationship to the patient, and why the patient cannot sign. (If the patient has died the survivor should contact the nearest social security office for information on what to do.)

IMPORTANT NOTES FOR PHYSICIANS AND SUPPLIERS

12: Acceptance of an assignment requires the physician (or supplier), to accept the charge determination of the Medicare carrier as his full charge for the service.

This form may also be used by a supplier, or by the patient to claim

reimbursement for charges by a supplier for services such as the use of an ambulance or medical appliances.

If the physician or supplier does not want Part II information released to the organization named in item 5, he should write "No further release" in item 7C following the description of services.

100-68793 C F MURPHY

S. D. OF N. Y. 18

UNITED MEDICAL SERVICE, INC.
TWO PARK AVENUE NEW YORK, N.Y. 10016
TELEPHONE 212/853-7200

MEDICARE PAYMENT

FOR HEALTH INSURANCE
SOCIAL SECURITY ACT

HEALTH INSURANCE CLAIM NUMBER ▶

076-16-0064-A

1-103
210
23293554

CHECK NUMBER ▶

23293554

PAY TO THE ORDER OF

SEYMOUR C FELDMAN MD
620 WOLCOTT AVE
BEACON N Y

MO. DATE DAY YR.

DOLLARS CENTS

07-17-72

\$*****38.40

12508

VOID IF NOT CASHED WITHIN 6 MONTHS

AUG 31 1972

Benedict Lio

AUTHORIZED SIGNATURE

BANKERS TRUST COMPANY
16 WALL STREET NEW YORK, N.Y. 10005

⑈ 23293554 ⑈ ⑆ 0210 ⑈ 0103 ⑈ 01 ⑈ 00013901 ⑈

USA 338-475
(ED. 4-23-71)

Gov't's
EXHIBIT

U. S. DIST. COURT
S. D. OF N. Y.

18-B. J. d.

A-9

A-10

0 9 3

AS PROVIDED BY THE TERMS OF THE LAW UNDER WHICH THIS CHECK IS ISSUED, THE UNDERSIGNED PAYEE, IN ACCEPTING ASSIGNMENT, AGREED THAT THE REASONABLE CHARGE DETERMINED BY THE MEDICARE CARRIER SHALL BE THE FULL CHARGE FOR ANY SERVICE FOR WHICH THE CHECK IS PAYABLE.

This payment is made with Federal funds. Fraud in procuring, forging of signature or endorsement, or materially altering this check is punishable under the U. S. Criminal Code.

S. Fair

PAY ANY BANK, P.E.G.
THE CHASE
111 N. NEW YORK
8

2 12 0 9 3

3 AUG

PAY ANY BANK, P.E.G.
THE CHASE
111 N. NEW YORK

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Rhea Kemble Nergarten being duly sworn,
deposes and says that *she* is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *6th* day of *May, 1977*
she served ~~a~~ copy of the within *Brieger Appeal*
by placing the same in a properly postpaid franked
envelope addressed:

Irving Anolik, Esq.
225 Broadway
New York, N.Y. 10007

An deponent further says that *she* sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Rhea Kemble Nergarten

Sworn to before me this

6th day of *May, 1977*

Phyllis G. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978